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REPORT
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REGULATORY FAIR WARNING ACT

SEPTEMBER 28, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HYDE, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 3307]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3307) to amend title 5, United States Code, to provide for a limitation on sanctions imposed by agencies and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Fair Warning Act".

SEC. 2. AFFIRMATIVE DEFENSE AGAINST IMPOSITION OF FINES OR OTHER PENALTIES BY AGENCIES.

Section 558 of title 5, United States Code, is amended by adding at the end the following new subsection:

"(d)(1) No fine or other penalty shall be imposed on a person by an agency for a violation of a rule if the agency finds that—

"(A) the rule, other general statements of policy, and related guidances, policies, and other public statements—

"(i) published in the Federal Register by the agency, or

"(ii) as to which such person had actual notice,

failed to give such person fair warning of the conduct that the rule prohibits or requires; or

"(B) such person committed the violation in reasonable reliance upon a written statement by a Federal or State official, with real or apparent authority to interpret such rule, made after disclosure by such person of all material facts

that such person was in compliance with, exempt from, or otherwise not subject to, the requirements of the rule.

"(2) In an action brought to impose a fine or other penalty on a person for an alleged violation of a rule, an agency shall not give deference to any interpretation of such rule relied on by the agency that was not published in the Federal Register or was not otherwise available to such person prior to the alleged violation.

"(3) For purposes of this subsection, a person shall be considered to have received fair warning of the conduct that a rule of an agency prohibits or requires—

"(A) if a person, acting reasonably and in good faith, would be able to identify, with ascertainable certainty, the standards with which such agency expects such person's conduct to conform, or

"(B) when a person first received notice of the initiation of a proceeding against such person for violation of such rule by the agency which issued such rule.

"(4) The defenses authorized by this subsection shall not apply with respect to a violation of a rule which is a health or safety related rule which has been issued on an emergency basis.".

SEC. 3. AFFIRMATIVE DEFENSE AGAINST IMPOSITION OF FINES OR OTHER PENALTIES BY COURTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1660. Affirmative defense against fines or other penalties for violations of agency rules

"(a) No civil or criminal fine or other penalty shall be imposed on a person by a court for a violation of a rule and no fine or other penalty imposed by an agency for a violation of a rule shall be approved by a court if the court finds that—

"(1) the rule, other general statements of policy, and related guidances, policies, and other public statements—

"(A) published in the Federal Register by the agency which promulgated such rule, or

"(B) as to which such person had actual notice,

failed to give such person fair warning of the conduct that the rule prohibits or requires; or

"(2) such person committed the violation in reasonable reliance upon a written statement by a Federal or State official, with real or apparent authority to interpret such rule, made after disclosure by such person of all material facts, that such person was in compliance with, exempt from, or otherwise not subject to, the requirements of the rule.

"(b) In an action brought to impose a civil or criminal fine or other penalty on a person for an alleged violation of a rule, the court shall not give deference to any interpretation of such rule relied on by the agency that promulgated the rule that was not published in the Federal Register or was not otherwise available to such person prior to the alleged violation.

"(c) For purposes of this section, a person shall be considered to have received fair warning of the conduct that a rule of an agency prohibits or requires—

"(1) if a person, acting reasonably and in good faith, would be able to identify, with ascertainable certainty, the standards with which such agency expects such person's conduct to conform, or

"(2) when a person first received notice of the initiation of a proceeding against such person for violation of such rule by the agency which issued such rule.

"(d) The defenses authorized by this section shall not apply with respect to a violation of a rule which is a health or safety related rule which has been issued on an emergency basis.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following new item:

"1660. Affirmative defense against fines or other penalties for violations of agency rules.".

Amend the title so as to read:

A bill to amend title 5, United States Code, to provide an affirmative defense against fines or other penalties imposed by agencies and for other purposes.

PURPOSE AND SUMMARY

"The Regulatory Fair Warning Act"—H.R. 3307—is designed to ensure that federal agencies respect the due process rights of persons subject to their jurisdiction. H.R. 3307 provides a statutory basis for affirmative defenses against fines or penalties imposed by agencies for the violation of rules where: (1) a rule or other policy document published in the Federal Register (or of which a person had actual notice) failed to give a regulated party fair warning of the conduct prohibited or required; or (2) a person reasonably relied upon a written statement by a Federal or State official that his or her conduct was in compliance with the rule. The bill codifies the decisions of several recent U.S. circuit courts of appeals that have addressed the principles involved in the adequate notice or fair warning defense,[1] and is intended to eliminate an agency's authority to impose penalties where those principles are not respected.

The bill would preclude an agency or court from imposing a fine or other penalty upon a person under two specific circumstances. The first is where the agency or court determines that a rule, general policy statement, or related guidance, either published in the Federal Register by the agency or communicated to that person through actual notice, failed to give that person fair warning of the conduct that a rule prohibits or requires. The bill defines "fair warning" as set forth by the United States Court of Appeals for the D.C. Circuit in the recent case of *General Electric Co.* v. *Environmental Protection Agency,*[2] and specifically, it provides that a person shall have received fair warning of the conduct prohibited or required if a person, acting in good faith, would be able to identify with ascertainable certainty the standards with which the agency expects a person's conduct to conform.[3] The second is where the agency or court determines that a person acted in reasonable reliance upon a written statement from an appropriate Federal or State official (i.e. one with real or apparent authority to interpret the rule) that that person's conduct was in compliance with the rule, after all material facts were disclosed.

H.R. 3307 is intended to protect regulated individuals or entities which are subject to agency penalties, who in good faith are able to prove either of these two defenses. It is intended to encourage agencies to promulgate clear and unambiguous regulations and policy statements. The Committee intends the legislation to require agencies to acknowledge the "fair warning" and "reasonable reliance" defenses which exist in current law, and make factual and legal findings regarding the evidence supporting such defenses before determining the merit of such arguments.

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[1] *See, e.g., S. G. Lowendick and Sons, Inc.* v. *Reich,* 70 F.3d 1291 (D.C. Cir. 1995); *General Electric Co.* v. *EPA,* 53 F.3d 1324 (D.C. Cir. 1995); *McElroy Electronics Corp.* v. *FCC,* 990 F.2d 1351 (D.C. Cir. 1993); *Rollins Environmental Services, Inc.* v. *EPA,* 937 F.2d 649 (D.C. Cir. 1991); *Satellite Broadcasting Co., Inc.* v. *FCC,* 824 F.2d 1 (D.C. Cir. 1987); and *Gates & Fox, Co.* v. *OSHRC,* 790 F.2d 154 (D.C. Cir. 1986).

[2] *General Electric* v. *EPA,* 53 F.3d 1324 (D.C. Cir. 1995).

[3] *Id.* at 1329.

BACKGROUND AND NEED FOR LEGISLATION

BACKGROUND

On July 14, 1995, during consideration of S.343, the "Comprehensive Regulatory Reform Act of 1995," the U.S. Senate adopted an amendment designed to protect against the unfair imposition of penalties for the violation of federal rules.[4] The amendment, offered by Senator Hutchison, would have precluded an agency from imposing a civil or criminal penalty on a regulated entity if such entity did not have fair warning of the conduct prohibited by the rule.[5] The amendment passed the Senate by a vote of 80 to 0.[6]

On April 24, 1996, Congressman George Gekas introduced H.R. 3307, the "Regulatory Fair Warning Act." The bill, which amends titles 5 and 28 of the U.S. Code, was referred to the Committee on the Judiciary and, within the Committee, to the Subcommittee on Commercial and Administrative Law. Upon introducing the bill, Congressman Gekas, the chairman of the Subcommittee on Commercial and Administrative Law, characterized H.R. 3307 as follows: "(T)his legislation codifies the principles of due process, fair warning and common sense that were always intended to be required by the Administrative Procedure Act. The bill requires that an agency give the regulated community adequate notice of its interpretation of a rule."[7]

On May 2, 1996, the Subcommittee on Commercial and Administrative Law held a hearing on H.R. 3307. Testimony was heard from, among others, a current and former deputy assistant attorney general of the Department of Justice, a senior attorney with the National Resources Defense Council, and several members of the regulated public who testified of their experiences with the Occupational Health & Safety Administration, the Army Corps of Engineers, the Department of Agriculture, and the U.S. Environmental Protection Agency. H.R. 3307 was reported favorably by the Subcommittee on June 20, 1996, after the adoption of several amendments. The full Judiciary Committee favorably reported a substitute amendment to H.R. 3307 on August 1, 1996.

Differences between the Senate amendment and H.R. 3307, as reported, are significant. First, H.R. 3307 was drafted after considering the substantial criticisms made by the Department of Justice regarding the scope and wording of the Hutchison amendment.[8] For example, the Regulatory Fair Warning Act requires disclosure of all material facts by a person who utilizes the defense provided in subsection (d)(1)(B) of section 2 and subsection (a)(2) of section 3, and is effective upon the date of enactment rather than retroactive as is the Senate amendment. In addition, the bill was amended at Subcommittee markup to accommodate concerns raised by the Administration and others in testimony before the Subcommittee on Commercial and Administrative Law.[9]

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[4] 141 Cong. Rec. S9984 (daily ed. July 14, 1995) .
[5] 141 Cong. Rec. S9899 (Daily ed. July 13, 1995) (statement of Sen. Hutchison).
[6] 141 Cong. Rec. S9984 (Rollcall Vote No. 308 Leg.).
[7] 142 Cong. Rec. E635 (daily ed. April 25, 1996) (statement of Rep. Gekas).
[8] Letter from John R. Schmidt, Associate Attorney General, U.S. Department of Justice to Senators Robert J. Dole and Thomas A. Daschle. (July 13, 1995).
[9] *"The Regulatory Fair Warning Act": Hearings on H.R. 3307 Before the Subcomm. on Commercial and Administrative Law,* 104th Cong., 2d Sess. 104–67 (May 2, 1996).

The bill was again amended in full Committee, in response to further concerns raised by various federal agencies, as well as the Office of Management and Budget. Those changes were incorporated in a substitute amendment offered by Congressman Gekas and adopted by the full Committee. The Gekas substitute made substantial changes to the Subcommittee reported bill. It eliminated the defense contained in the bill which would have allowed a person to argue that penalties should not be imposed upon them because they reasonably and in good faith determined, based on the rule and other statements, that they were in compliance with or exempt from the rule. The Department of Justice testified against that provision and the Administration argued that the provision allowed a subjective decision by an individual to immunize conduct which was contrary to the intent of a rule. Secondly, the Gekas substitute included a definition of the term "fair warning." The Administration testified in support of the fair warning defense as described in *General Electric* v. *EPA,* but expressed concern that the legislation did not specify that the term "fair warning" in the bill would parallel that in case law. In response, the Committee added a definition of the term "fair warning" which is largely based upon the GE case.

SAFEGUARDS OF THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act,[10] enacted in 1946, was designed to provide uniformity and predictability to the various administrative processes employed by the many agencies of the Federal government. One of the fundamental precepts of the APA is the uniform requirement of notice to parties affected by agency actions. Section 552(a)(1)(D) requires all federal agencies to publish in the Federal Register "substantive rules of general applicability, as authorized by law, statements of general policy, or interpretations of general applicability formulated or adopted by the agency." The importance of this requirement is emphasized by the fact that no exceptions are provided to this provision. That is, due process rights of the regulated public are paramount in the notice requirements of the APA.

The original drafters of the APA intended to discourage agencies from adversely affecting the rights of the regulated public, where notice of a rule's requirements has not been adequately communicated. The Senate Judiciary Committee's report on the APA stated that: "[T]he bill is designed to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected."[11] The high standard to which Congress intends to hold agencies with regard to the issue of notice was made clear in later additions to the statute's language which provide: "[E]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner (emphasis added) be required to resort to or be adversely affected by, a matter required to be published in the Federal Register and not so published."[12] Clearly, fair notice of a regulation's actual requirements

[10] 5 U.S.C. §§ 551–559, 701–706 (1994).
[11] S. Rep. No. 193, 79th Cong., 2d Sess. (1946).
[12] 5 U.S.C. § 552(a).

is a procedural right bestowed upon the regulated public by the APA.

Federal courts, in interpreting this language, have balanced the agency's ability to carry out its responsibilities against the regulated public's right to know. Take, for example, the case of *Appalachian Power Co.* v. *Train,*[13] which involved a dispute between several power companies and the Environmental Protection Agency (EPA) over regulations issued by EPA pursuant to the Federal Water Pollution Control Act Amendments of 1972. The Act required cooling water intake structures to reflect the best technology available for minimizing any adverse environmental impact. The EPA regulation at issue required the regulated public, in determining the best available technology, to consider information contained in the agency's "Development Document." The "Development Document" was not published in the Federal Register nor were the parties given actual notice of the information contained therein. In ruling against the EPA and holding its regulation to be ineffective against the regulated parties, the court held that:

> Any agency regulation that so directly affects preexisting legal rights or obligations, indeed that is of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence, is within the publication requirement.[14] (citations omitted).

The APA and relevant court interpretations leave no question but that notice to the regulated public—either through publication in the Federal Register or via actual notice—is fundamental to an agency's ability to ultimately enforce its own regulations. However, courts have struggled to determine where an agency's obligation to give notice ends. One test was established in *Lewis* v. *Weinberger,*[15] which involved a challenge to the Indian Health Service's failure to give notice of certain policy coverage limitations through publication in the Federal Register. In ruling against the agency, the court held that the APA requires notice by publication whenever agencies adopt new rules or substantially modify existing rules, and thereby cause direct and significant impact upon the substantive rights of the general public.[16]

Another instructive case is a decision by the Ninth Circuit Court of Appeals in *Anderson* v. *Butz,*[17] where the Department of Agriculture amended a handbook which contained instructions on calculating food stamp benefits. The court, in holding against the Department, ruled that the APA permits an agency to refrain from publishing a document only when: "(1) a clarification or explanation of existing laws or regulations is expressed; and (2) no significant impact upon any segment of the public results."[18] Whatever the formulation arrived at in these cases, it is clear that the courts have found that notions of due process inherent in the APA were intended to render an agency's enforcement authority less

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[13] *Appalachian Power Co.* v. *Train,* 556 F.2d 451 (4th Cir. 1977).
[14] *Id.,* at 455.
[15] *Lewis* v. *Weinberger,* 415 F.Supp. 652 (D. N.M. 1976).
[16] *Id.* at 659.
[17] *Anderson* v. *Butz,* 550 F.2d 459 (9th Cir. 1977).
[18] *Id.* at 463.

than plenary where fair notice to the regulated public has not been accomplished.

AGENCY AUTHORITY AND DUE PROCESS

The Fifth Amendment to the U.S. Constitution provides that "[n]o person * * * shall be deprived of life, liberty, or property, without due process of law." The purpose and fundamental guarantee of the due process clause is to ensure fairness and substantial justice.[19] Where the Government has adversely affected a person's rights in life, liberty or property, that person shall be afforded due process.[20]

It is a basic principle of due process that a statute may be deemed to be void for vagueness if its prohibitions are not clearly defined.[21] This fundamental proscription against vague laws is set forth in the early case of *U.S.* v. *L. Cohen Grocery Co.*[22] In *Cohen*, a dealer in sugar was charged with violating the Lever Act, which made it unlawful for any person to willfully charge any unjust rate in dealing in any necessaries.[23] The Supreme Court, in quashing the indictment, concluded that the law was too vague, indefinite, and uncertain since it fixed no immutable standard and was unconstitutional since it did not inform the defendant of the nature and cause of the accusation against him.[24] The Supreme Court more recently reiterated this principle in striking down a local picketing regulation. It stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[25]

The essential guarantee of the due process clause is that of fairness—to ensure there is always a neutral decision-maker, be it a judge, hearing officer or agency.[26] The Supreme Court has long held that a fair process in a fair tribunal are basic requirements of due process, and that this requirement applies to administrative agencies as well as to courts.[27] Federal courts have recognized this principle and have applied it to guide the rulemaking process used by federal agencies. As the D.C. Circuit recently ruled: "[T]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a party for violating

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[19] *See,* John E. Nowak and Ronald D. Rotunda, *Constitutional Law,* West Publishing Co. at 511 (5th ed. 1995).
[20] *Id.* at 510.
[21] *Grayned* v. *City of Rockford,* 408 U.S. 104, 108–109 (1972).
[22] *U.S.* v. *L. Cohen Grocery Co.,* 255 U.S. 81 (1921).
[23] *Id.* at 86.
[24] *Id.* at 87–88.
[25] *Grayned,* 408 U.S. at 108.
[26] Nowak, *supra*, note 24, at 510.
[27] *Withrow* v. *Larkin*, 421 U.S. 35 (1975); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973).

a rule without first providing adequate notice of the substance of the rule."[28] This basic due process concept has repeatedly been adopted by federal courts in determining whether agencies have overstepped their bounds in enforcing their regulations.[29]

THE FAIR WARNING DEFENSE

Despite Congress' attempt to instill procedural due process protections and a right to notice for the regulated public through APA provisions, some agencies have strayed from the law's intent. Over the past two decades federal courts have been forced to overturn the imposition of sanctions where agencies have penalized regulated entities for violations of rules determined to be too vague, incomprehensible or implemented pursuant to a non-public agency interpretation. This trend, which some have characterized as agency overzealousness, has resulted in a recent line of federal court decisions that have insulated the regulated public from penalties where an agency has failed to give fair warning of what a rule requires.

For example, in *General Electric Co.* v. *EPA*,[30] the General Electric Company (GE) was fined by EPA for violating a regulation governing the disposal of polychlorinated biphenyl (PCB). Although the court gave traditional deference to the agency's interpretation of its own rule, since penalties were sought by EPA, the court's determination became contingent upon the issue of whether the rule provided GE with fair warning of the conduct it required. The court held that due process requires parties to receive fair notice before being deprived of property, and concluded that EPA's interpretation of its own regulation did not give the company fair warning of what the rule required. In reversing the agency's imposition of a fine, the court stated:

> Although the agency must always provide "fair notice" of its regulatory interpretations to the regulated public, in many cases the agency's pre-enforcement efforts to bring about compliance will provide adequate notice. * * * In some cases, however, the agency will provide no pre-enforcement warning, effectively deciding to use a citation—as the initial means for announcing a particular interpretation—or for making its interpretation clear. * * * In such cases, we must ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations, if, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.[31]

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[28] *Satellite Broadcasting, supra,* at 3.
[29] *Lowendick, supra; General Electric, supra; McElroy Electronics , supra; Rollins, supra; and Gates and Fox, supra.*
[30] *General Electric, supra,* at 1327.
[31] *Id.* at 1329.

The *GE* Court's "fair warning" ruling exhibits a dual respect for both constitutional due process protections and the fundamental notice requirements of the APA.

Nine years before its holding in *GE*, the U.S. Court of Appeals for the D.C. Circuit enunciated a similar "fair warning" test for agencies attempting to penalize the public for violations of federal rules. In *Gates & Fox* v. *OSHRC,*[32] an employer was cited for violating Occupational Safety and Health Administration (OSHA) regulations that required employers engaged in tunneling to provide emergency breathing equipment for each employee near an advancing face of a tunnel. Although the court acknowledged the traditional deference to the agency's interpretation, it ruled that since penalties were sought by the agency, due process concerns diluted that traditional deference. The court stated:

> Courts must give deference to an agency's interpretation of its own regulations. Where the imposition of penal sanctions is at issue, however, the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.[33]

The court went on to cite the Fifth Circuit decision in *Diamond Roofing Co.* v. *OSHRC,*[34] as follows:

> An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires. * * * If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.

The court, in granting the petition for review of the Commission's decision to impose sanctions, held that the Gates & Fox Company did not receive adequate notice of the prohibited conduct.

A year later, the U.S. Court of Appeals for the D.C. Circuit relied on its ruling in *Gates & Fox* to again prohibit an agency from penalizing the regulated public where adequate notice was not provided. In *Satellite Broadcasting Co., Inc.* v. *FCC,*[35] the Federal Communications Commission (FCC) dismissed the Satellite Broadcasting Company's (SBC) applications to operate certain microwave radio stations because they were filed at the wrong location.[36] The FCC rule, pursuant to which the SBC filed its applications, did not at the time of SBC's filing specify the location at which applications were to be filed. In ruling against the agency,[37] the court held that while the agency's interpretation of its rules is entitled to deference, if it wishes to use an interpretation to cut off a party's

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[32] *Gates & Fox, supra,* at 155.
[33] *Id.* at 156.
[34] 528 F.2d 645, 649 (5th Cir., 1976).
[35] *Satellite Broadcasting, supra.*
[36] The SBC filed its application in Washington, D.C. The subsequently amended rule required such applications to be filed in Gettysburg, Pennsylvania.
[37] The court held that the FCC's order dismissing the SBC's application was arbitrary and capricious and remanded the case for reinstatement.

rights, it must give full notice of its interpretation. In reiterating its previous holding, the court stated: "Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." [38] The court acknowledged that the agency's interpretation was a reasonable one, but determined that the private party's interpretation was equally reasonable and concluded that an agency, through its regulatory power, cannot punish a member of a regulated class for reasonably interpreting agency rules.

While the U.S. Court of Appeals for the D.C. Circuit has been called upon more frequently to rule on the "fair warning" defense, other circuits have also recently had to face the issue. In *Georgia Pacific Corporation* v. *The Occupational Safety and Health Review Commission,*[39] the Eleventh Circuit Court of Appeals ruled against the Occupational Safety and Health Review Commission (OSHRC) regarding its imposition of a penalty for violation of a forklift regulation. In vacating the penalty, the court held:

> Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires. A statute or regulation is considered unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments if it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.[40]

The Seventh Circuit Court of Appeals in *Kropp Forge Company* v. *The Secretary of Labor,*[41] ruled against the OSHRC's imposition of a penalty against a regulated party for violation of a noise level regulation. The court determined the regulation to be vague and stated: "[T]he pertinent parts of the regulation do impose 'penal sanctions' and the regulation in issue does not give reasonable notice of the conduct said to be prohibited. * * *" [42] The Fifth Circuit Court of Appeals also addressed the fair warning issue the aforementioned case of *Diamond Roofing Company* v. *The Occupational Safety and Health Review Commission.*[43]

The Third Circuit Court of Appeals in *Dravo Corporation* v. *The Occupational Safety and Health Review Commission,*[44] ruled against the Commission regarding its interpretation of an OSHA ship building regulation and stated:

> Because we deal here with a penal sanction, we begin with a recognition that the coverage of an agency regulation should be no broader than what is encompassed in its

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[38] *Id.* at 3.
[39] *Georgia Pacific Corporation* v. *The Occupational Safety and Health Review Commission,* 25 F.3d 999 (11th Cir. 1994).
[40] *Id.* at 1005.
[41] *Kropp Forge Company* v. *The Secretary of Labor,* 657 F.2d 119 (7th Cir. 1981).
[42] *Id.* at 123.
[43] *Diamond Roofing Company* v. *The Occupational Safety and Health Review Commission, supra* at 649.
[44] *Dravo Corporation* v. *The Occupational Safety and Health Review Commission,* 613 F.2d 2127 (3rd Cir. 1980).

> terms * * *. [T]he Secretary as enforcer of the [regulations] has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated.[45]

Virtually every U.S. circuit court of appeals that has had the opportunity to rule on an appeal involving the "fair warning" defense has been consistent in ruling against agencies that have sought to impose penalties where adequate notice was not given.

THE REASONABLE RELIANCE DEFENSE

Some federal statutes, which require numerous regulations to implement, provide agencies the power to delegate enforcement authority to state governments.[46] Such delegations of authority have led to dual enforcement schemes shared between federal and state officials. Where conflicts have arisen between state and federal authorities regarding interpretations of federal rules, federal agencies have been reluctant to grant regulated parties the benefit of the doubt, and instead have sought to penalize the private party for reliance on a state authority's interpretation. Recent disputes where a federal agency has been reluctant to recognize a regulated party's good faith reliance defense under this dual enforcement circumstance have been resolved pursuant to voluntary consent decrees.[47] It is the Committee's intent that the agencies and courts acknowledge the "reasonable reliance" defense fully consistent with the terms of the new subsection 558(d)(1)(B). If a person relies on a written statement of a federal or state official who has real or apparent authority to interpret a rule, that reliance is reasonable.

THE NEED FOR LEGISLATION

The goal of the APA—to provide an administrative process that is uniform and predictable to the regulated public—is undermined when penalties are imposed where the procedural requirements of due process notice and fair warning are in doubt. Agencies that issue unclear rules or reinterpret rules within their own walls, without regard to the understanding of the regulated public, are not acting consistent with the goals of the APA. In such circumstances, regulated parties may find it difficult, if not impossible, to plan their affairs with confidence until the regulation is challenged and publicly interpreted by an agency or court.

Where agencies choose to ignore the notice requirements of the APA, and seek instead to impose penalties on regulated entities in the face of the "fair warning" or "reasonable reliance" defenses, the financial cost and the burden of uncertainty fall upon the regulated public. For example, in *Rollins Environmental Services*,[48] the EPA took years to settle on an interpretation of a confusing regulation governing the incineration of solvents used to decontaminate PCB

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[45] *Id.* at 2132.

[46] *See, e.g.,* The Clean Air Act (codified as amended at 42 U.S.C. § 7401 et. seq.), and the Clean Water Act (codified as amended at 33 U.S.C. § 1251 et. seq.).

[47] *See,* Consent Decree in *U.S.* versus *Louisiana Pacific Corporation,* Civ. No. 6:93-0869 (W.D. LA.) 58 Fed. Reg. 34591 (June 28, 1993) Notice of Amended Consent Decree 60 Fed. Reg. 62258 (December 5, 1995); and Consent Decree in *U.S.* versus *Georgia Pacific Corporation,* Civ. No. 1: 96–CV–1318–FMH (N.D. GA.) 61 Fed. Reg. 42266 (August 14, 1996).

[48] 937 F.2d 649 (D.C. Cir. 1991).

containers.[49] EPA took six years just to file a complaint against Rollins,[50] and a full year after filing the complaint, prepared an internal report that acknowledged significant disagreement among various headquarters and regional offices concerning the regulation's actual meaning.[51] Even though the D.C. Circuit refused to enforce the civil fine, that does not erase the years of uncertainty to which the agency subjected an entire industry.[52]

The fact that numerous agency penalties have been overturned at the appellate level indicates that some agencies are ignoring or simply dismissing these defenses in many cases.[53] Although appellate court rulings regarding the imposition of penalties in fair warning circumstances have been consistent, this has not discouraged agencies from pursuing penalties in such cases. Litigation which begins at the agency level and is ultimately resolved in a U.S. circuit court of appeals is expensive and time consuming. When agencies, to the detriment of the public, ignore the principles of due process and prior appellate court decisions on point, then Congress has a responsibility to act.

H.R. 3307 is born of the regulated public's appeal to Congress to respond to the actions of a stubborn and litigious administrative bureaucracy. The legislation does not impinge upon any agency's authority to enforce its regulations—it merely requires agencies to respect and acknowledge the "fair warning" and "reasonable reliance" defenses with regard to the issuance of penalties. H.R. 3307 codifies the decisions of several U.S. circuit courts of appeal which have ruled on the issue of fair warning[54] where the imposition of penalties is at stake. The bill provides that no civil or criminal fine or penalty shall be imposed by an agency or court if the agency or court finds that: (1) the rule alleged to be violated, and other policy statements or guidances, whether published in the Federal Register, or brought to the regulated party's actual notice, failed to give a person fair warning of the conduct that the rule prohibits or requires; or (2) the regulated person acted in reasonable reliance upon a written statement of a federal or state official that the person's conduct was in compliance with the rule, as long as all material facts regarding the conduct were disclosed.

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[49] *Id.* at 652.
[50] *Id.* at 651.
[51] *Id.* at 653.
[52] Manning, *supra,* note 31, at 612.
[53] For example, in *GE* v. *EPA*, *supra,* the Environmental Appeal Board of the EPA summarily dismissed GE's "fair warning" defense without making any legal or factual findings regarding the defense or evidence supporting the defense. The Appeals Board in dismissing GE's defense simply stated:

GE did not comply with [the regulation] and was therefore properly charged with, and found guilty of violating the disposal regulation. This conclusion is based on the plain language of [the regulation]; GE's arguments that it did not have fair notice of what the law requires are rejected. * * * GE's proffered defenses are purely legal in nature and, for the most part, are not even relevant to these charges; they in no way prove or offset any of the elements that make up a violation of this regulatory requirement. *In re General Electric Co.,* Board of Appeals, U.S. Environmental Protection Agency, Docket No. TSCA IV–89–0016, TSCA Appeal No. 92–2a (November 1, 1993).

[54] The legislation explicitly codifies the case of *GE, supra,* in that the language of subsections (d)(3)(A) of section 2 and (c)(1) of section 3 of the bill is identical to the language of the *GE* decision.

HEARINGS

The Committee's Subcommittee on Commercial and Administrative Law held a hearing on H.R. 3307 on May 2, 1996. Testimony was received from: James F. Simon, Deputy Assistant Attorney General, Environment and Natural Resources Division of the Department of Justice, accompanied by Edward L. Dowd, Jr., United States Attorney, Eastern District of Missouri; Roger J. Marzulla, Esq., former Assistant Attorney General, Environment and Natural Resources Division of the Department of Justice; David Hawkins, Senior Attorney, Natural Resources Defense Council; Laurent R. Hourclé, Assistant Professor of Environmental Law, The National Law Center, The George Washington University; Susan Eckerly, Director of Regulatory Policy, Citizens for a Sound Economy; Robert J. Brace, Robert Brace Farm, Inc.; Vitas M. Plioplys, Manager of Safety Services, R.R. Donnelley & Sons, Co.; and Robert McMackin, with additional material submitted by Andrew S. Liscow, Vice President, Cincinnati Preserving Co.

COMMITTEE CONSIDERATION

On June 20, 1996, the Subcommittee on Commercial and Administrative Law met in open session and ordered favorably reported the bill H.R. 3307, amended, by a voice vote, a quorum being present. On July 30, 31, and August 1, 1996, the full Judiciary Committee met in open session and ordered reported favorably the bill H.R. 3307, amended, by a recorded vote of 16 to 9, a quorum being present.

VOTE OF THE COMMITTEE

There were ten amendments offered during full Committee consideration. However, only one amendment, an amendment in the nature of a substitute offered by Mr. Gekas, was adopted. That amendment was adopted by voice vote. The bill, as amended by the Gekas substitute, was favorably reported to the House by a roll call vote of 16 to 9.

Mr. Scott offered an amendment to require that the defenses provided for in the bill not apply with regard to circumstances where multiple and conflicting statements are issued from the same agency. The Scott amendment was defeated by voice vote. In addition, there were recorded votes on nine amendments and one motion to table during the Committee's consideration of H.R. 3307, as follows:

1. A substitute amendment offered by Mr. Reed to strike the specific affirmative defenses provided for in the bill and instead provide a general prohibition on agencies from imposing civil fines where "fair warning" was not provided to a regulated party. Defeated 9–13.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Moorhead
Mr. Reed	Mr. Sensenbrenner
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Smith (TX)
Mr. Watt	Mr. Gallegly
Ms. Lofgren	Mr. Canady
Ms. Jackson Lee	Mr. Buyer
Ms. Waters	Mr. Bono
	Mr. Heineman
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

2. An amendment offered by Mr. Scott to provide that the defenses in the bill would not apply where a conflict exists between an agency's interpretation of a rule and a regulated person's interpretation of a rule where fair warning has been given. Defeated 8–15.

YEAS	NAYS
Mr. Frank	Mr. Hyde
Mr. Berman	Mr. Moorhead
Mr. Reed	Mr. Sensenbrenner
Mr. Scott	Mr. Gekas
Mr. Watt	Mr. Schiff
Ms. Lofgren	Mr. Gallegly
Ms. Jackson Lee	Mr. Canady
Ms. Waters	Mr. Goodlatte
	Mr. Buyer
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

3. An amendment offered by Ms. Waters to require that the defenses provided for in the bill not apply to any federal rule which is issued for the protection of the health and safety of workers in the United States. Defeated 9–16.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Moorhead
Mr. Schumer	Mr. Sensenbrenner
Mr. Berman	Mr. McCollum
Mr. Reed	Mr. Gekas
Mr. Scott	Mr. Schiff
Mr. Watt	Mr. Gallegly
Ms. Lofgren	Mr. Canady
Ms. Waters	Mr. Goodlatte
	Mr. Buyer
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

4. A motion offered by Mr. Gekas to table the motion by Ms. Lofgren to suspend consideration of H.R. 3307 until September 17. Passed 15–10.

YEAS	NAYS
Mr. Hyde	Mr. Frank
Mr. Moorhead	Mr. Schumer
Mr. Sensenbrenner	Mr. Berman
Mr. McCollum	Mr. Reed
Mr. Gekas	Mr. Nadler
Mr. Schiff	Mr. Scott
Mr. Gallegly	Mr. Watt
Mr. Canady	Ms. Lofgren
Mr. Goodlatte	Ms. Jackson Lee
Mr. Bono	Ms. Waters
Mr. Heineman	
Mr. Bryant (TN)	
Mr. Chabot	
Mr. Flanagan	
Mr. Barr	

5. An amendment offered by Ms. Lofgren to provide that the defenses in the bill will not apply to safety rules issued by the Secretary of Transportation or to interpretations of any of its underlying agencies. Defeated 9–12.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Moorhead
Mr. Reed	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Coble
Mr. Watt	Mr. Canady
Ms. Lofgren	Mr. Goodlatte
Ms. Jackson Lee	Mr. Bono
Ms. Waters	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Barr

6. An amendment offered by Ms. Lofgren to provide that the defenses in the bill will not apply to any rule issued by the Consumer Product Safety Commission for the protection of children from hazardous products. Defeated 4–12.

YEAS	NAYS
Mr. Nadler	Mr. Hyde
Mr. Watt	Mr. Moorhead
Ms. Lofgren	Mr. Gekas
Ms. Jackson Lee	Mr. Coble
	Mr. Smith (TX)
	Mr. Gallegly
	Mr. Canady
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan

7. An amendment offered by Ms. Jackson Lee to provide that the defenses in the bill will not apply to any law which protect human health and the environment. Defeated 8–13.

YEAS	NAYS
Mrs. Schroeder	Mr. Moorhead
Mr. Berman	Mr. Coble
Mr. Bryant (TX)	Mr. Smith (TX)
Mr. Reed	Mr. Canady
Mr. Watt	Mr. Inglis
Ms. Lofgren	Mr. Goodlatte
Ms. Jackson Lee	Mr. Buyer
Ms. Waters	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

8. An amendment offered by Mr. Reed to provide that the defenses in the bill will not apply to any rule issued by the Securities and Exchange Commission. Defeated 9–15.

YEAS	NAYS
Mrs. Schroeder	Mr. Hyde
Mr. Berman	Mr. Moorhead
Mr. Reed	Mr. Coble
Mr. Nadler	Mr. Smith (TX)
Mr. Scott	Mr. Schiff
Mr. Watt	Mr. Canady
Ms. Lofgren	Mr. Inglis
Ms. Jackson Lee	Mr. Goodlatte
Ms. Waters	Mr. Buyer
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

9. An amendment offered by Mrs. Schroeder to provide that the defenses in the bill will not apply to any actions taken by the Attorney General or the Equal Employment Opportunities Commission under title VII of the Civil Rights Act of 1964. Defeated 9–16.

YEAS	NAYS
Mrs. Schroeder	Mr. Hyde
Mr. Berman	Mr. Moorhead
Mr. Reed	Mr. Gekas
Mr. Nadler	Mr. Coble
Mr. Scott	Mr. Smith (TX)
Mr. Watt	Mr. Schiff
Ms. Lofgren	Mr. Canady
Ms. Jackson Lee	Mr. Inglis
Ms. Waters	Mr. Goodlatte
	Mr. Buyer
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

10. Vote on final passage of H.R. 3307. Adopted 16–9.

YEAS	NAYS
Mr. Hyde	Mrs. Schroeder
Mr. Moorhead	Mr. Berman
Mr. Gekas	Mr. Reed
Mr. Coble	Mr. Nadler
Mr. Smith (TX)	Mr. Scott
Mr. Schiff	Mr. Watt
Mr. Canady	Ms. Lofgren
Mr. Inglis	Ms. Jackson Lee
Mr. Goodlatte	Ms. Waters
Mr. Buyer	
Mr. Bono	
Mr. Heineman	
Mr. Bryant (TN)	
Mr. Chabot	
Mr. Flanagan	
Mr. Barr	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3307, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 28, 1996.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3307, "The Regulatory Fair Warning Act," as ordered reported by the House Committee on the Judiciary on August 1, 1996. CBO estimates that H.R. 3307 would not significantly affect governmental receipts or the direct spending that results from these receipts. Because enacting H.R. 3307 could affect receipts and direct spending, pay-as-you-go procedures would apply to the bill.

H.R. 3307 would prevent federal agencies and courts from imposing civil and criminal penalties on individuals for violating federal regulations if the regulating body failed to give fair warning through publication in the Federal Register or direct notice of the conduct prohibited or required. Furthermore, the bill would bar the imposition of penalties on individuals who violated regulations with reasonable reliance upon written documentation from an appropriate regulatory authority that they were in compliance or exempt from the regulation. According to the Department of Justice, the bill would establish affirmative defenses against the imposition of penalties which would likely increase the frequency and complexity of litigation in cases where individuals are accused of violating agency regulations. While the bill could prevent the imposition of penalties in some marginal cases, CBO estimates that these cases would result in only a modest reduction in penalties collected by the federal government. In most cases, the bill would not affect penalty collections because agencies and courts currently take such factors into consideration in determining the appropriateness of imposing a penalty. Several recent federal court cases have precluded agencies from imposing sanctions on regulated individuals based on evidence that the regulating agencies failed to provide fair warning. The bill would require agencies and courts to comply with the findings of these decisions. Because the bill largely codifies existing

practice, CBO estimates that it would not measurably reduce penalty collection.

Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting receipts or direct spending through 1998. Because H.R. 3307 could affect receipts by reducing civil and criminal penalty collections, pay-as-you-go procedures would apply to the bill. Criminal fines are deposited in the Crime Victims Fund and then spent out the following year. Thus, any change in receipts to the Crime Victims Fund would be matched by a change in direct spending from the fund, with a one year lag. These effects are summarized in the pay-as-you-go table below.

PAY-AS-YOU-GO CONSIDERATIONS

[By fiscal year, in millions of dollars]

	1996	1997	1998
Changes in receipts	0	0	0
Changes in outlays	0	0	0

H.R. 3307 contains no private sector or intergovernmental mandates as defined in Public Law 101–4, and would have no significant impact on the budgets of state, local, or tribal government.

If you wish further details on this estimate we will be pleased to provide them. The CBO staff contact is Stephanie Weiner, who can be reached at 226–2720.

Sincerely,

JUNE E. O'NEILL, *Director.*

AGENCY VIEWS

The Committee has received the following communications from the Departments of Justice, Treasury, and Labor.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, July 12, 1996.

Hon. HENRY HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: We understand that the House Judiciary Committee plans to mark up H.R. 3307, the "Regulatory Fair Warning Act," next week. I am writing to provide additional comments of the Department of Justice on H.R. 3307 as amended by the Commercial and Administrative Law Subcommittee at its June 20, 1996 markup. The Department originally testified in opposition to the bill on May 2, 1996 and remains strongly opposed to H.R. 3307, notwithstanding the amendments adopted by the Subcommittee.

On its face, the bill appeals to concepts that appear to be fair and unobjectionable. The Department of Justice fully supports the well-established principles that citizens should be given fair warning of what laws and regulations require and that citizens should be permitted reasonable reliance on government statements. Indeed, existing doctrines of due process and estoppel protect these principles

under current law. However, we believe H.R. 3307 goes beyond these principles and thus would have many harmful consequences that Congress does not intend. H.R. 3307's broad new legal defenses to civil or criminal enforcement of any federal rule would undermine public health, safety, environmental protection, and effective law enforcement.

First, the bill would make enforcement depend on the defendant's *belief* about the law, thereby creating a good-faith "mistake of the law" defense and seriously reducing protections for all Americans against law-breakers. In addition, the bill would allow businesses and individuals to rely on any statement by state officials that a given law or rule does not apply to particular conduct. This would effectively permit states to grant businesses or individuals an exception to federal rules, thereby undermining national uniformity in the application of federal law and lowering standards for compliance with federal regulations of all types, including those protecting public health, safety and the environment.

Finally, the bill's provision permitting only statements published in the Federal Register to constitute fair warning of regulatory requirements is unwise and unwarranted. For many regulated entities, publication in the Federal Register is not the best way to provide actual notice of regulatory requirements to an industry. This provision also does not recognize the various alternative ways in which regulated entities may receive *actual* notice of what the law requires.

We cannot predict with certainty how the courts will apply the broad and overlapping new defenses to civil and criminal enforcement that H.R. 3307 would create, but we continue to be concerned that the bill would seriously undermine the Justice Department's ability to carry out critical law enforcement responsibilities. For example:

The Americans with Disabilities Act—The Americans with Disabilities Act (ADA) provides anti-discrimination protections to 43 million persons with disabilities. Because the ADA created new and unfamiliar requirements, the government is required to provide Technical Assistance Manuals. *See* 42 U.S.C. 12206(c)(3). The Manuals are widely disseminated, but are not published in the Federal Register. Numerous court decisions have held that the interpretations of the ADA found in the Manuals are entitled to substantial deference. Because H.R. 3307 appears to require Federal Register publication of all rules, these Manuals could be rendered unenforceable. In addition, the bill would invite litigation over defendants' claims that they "reasonably and in good faith" determined that they were in compliance with, or exempt from, ADA requirements.

Child Pornography—To prevent the exploitation of children in films or photographs that depict sexually explicit conduct, the Justice Department has issued rules that require producers of these materials to keep and disclose records documenting the names and ages of the persons portrayed. Violators are subject to criminal penalties. Suppose a purveyor of child pornography elicits an erroneous opinion from an attorney that these rules are inapplicable to its operations. The pornographer could argue under H.R. 3307 that he "reasonably and in good faith determined" that he needs not com-

ply with the rules, and thereby avoid penalties for violations of the rules.

Prisoner Conduct—In discharging its statutory responsibility for the care, custody, and control of federal inmates, the Bureau of Prisons ("BOP") has issued comprehensive rules addressing a broad range of activities, including disciplinary regulations. H.R. 3307 implicates every possible interpretation of these regulations and could disrupt BOP's effective management and operation of federal prisons. For example, an inmate might contend that he had reasonably believed that BOP's rule against "interfering with a staff member in the performance of duties," codified at 28 CFR 541.13, did not provide fair notice that certain disruptive conduct was prohibited. It is difficult to predict the outcome of these types of cases under the bill, but at a minimum the bill could generate more, and we believe inappropriate, litigation to determine whether the prisoner's belief was reasonable. Inmates would have the time and incentive to raise every possible defense under the bill and exploit every arguable ambiguity in disciplinary sanctions proceedings.

Tax evasion—Taxpayers have attempted to argue in our criminal cases that they did not act willfully because the IRS had not published anything specifically saying that a particular tax evasion scheme was illegal. The courts have held that one can willfully evade taxes even though the IRS has not said that a particular scheme is illegal. The IRS does not typically identify specific schemes as illegal in the Federal Register. Under H.R. 3307, a tax evader could claim immunity from penalties for a scheme violating a regulation if the IRS had not specifically labelled it illegal.

H.R. 3307 could create similar barriers to law enforcement in many other regulatory programs administered or enforced by the Justice Department, including immigration, antitrust, and narcotics (e.g., the Drug Enforcement Administration's schedule of controlled substances).

In sum, H.R. 3307 provides many opportunities for abuse. To the extent that the goal of H.R. 3307 is to make regulations clearer and easier to understand, a better legislative approach is to support agency efforts to simplify and clarify regulations and improve coordination with state regulators, and to expand and facilitate agency efforts to inform the regulated community about what the law requires. The Department would welcome the opportunity to work with you, the Committee, and any other interested Members, to find productive ways to achieve these goals.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

ANN M. HARKINS
(For Andrew Fois, Assistant Attorney General).

DEPARTMENT OF THE TREASURY,
GENERAL COUNSEL,
Washington, DC, July 15, 1996.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter presents the views of the Department of the Treasury on H.R. 3307, the "Regulatory Fair Warning Act." While we agree that agencies should provide fair warning and assistance to persons attempting to comply with the law, the Department of the Treasury Strongly opposes H.R. 3307 because it would seriously impair the ability of the Department to enforce the law and administer its regulatory programs. In addition to the comments expressed below, the Department endorses the views expressed by the Department of Justice in its May 2, 1996, testimony before the Subcommittee on Commercial and Administrative law.

The bill provides that an agency or court cannot impose a civil or criminal fine or other penalty for a violation of a rule (or other guidance) published in the Federal Register if the rule failed to give "fair warning" of the prohibited or required conduct. The bill, however, does not define what constitutes "fair warning." In criminal law, the due process defense of "void for vagueness" protects persons from prosecutions for noncompliance with a rule if the rule is not sufficiently clear about the prohibited conduct. In civil law, statutes generally direct agencies and courts to take into account the objective reasonableness of a defendant's actions when assessing civil fines and penalties. It is unclear whether the proposed "fair warning" standard is merely intended to mirror the current standards, or whether it constitutes a super mandate that imposes a different standard. If the former, the provision is unnecessary and confusing; if the latter, it will result in years of litigation before a body of reliable case law is developed to enable agencies to satisfy the new standard.

The bill also provides that an agency or court cannot impose a civil or criminal fine or other penalty for violation of a rule, if the person charged with the violation "reasonably and in good faith determined" on the basis of material a published by the agency in the Federal Register, that he or she was in compliance with, exempt from, or otherwise not subject to, the requirements of the rule. This provision is highly objectionable for a number of reasons.

This provision would undermine the entire range of Treasury's law enforcement and regulatory programs. The longstanding principle that mistake or ignorance of the law is not a valid defense would be replaced by a subjective standard that provides that no penalty can be imposed on a person who believed that he or she was in compliance with the law, even if he or she clearly and objectively was in violation of the law. Such a standard encourages ignorance of the law and removes all incentives for persons to know and undertake their obligations to society under the law. In a business context, the bill rewards precisely the wrong behavior; it places conscientious law-abiding businesses at a competitive disadvantage relative to those that cut costs by violating the law without the threat of civil or criminal penalties.

Furthermore, it is inappropriate to determine whether a person acted reasonably and in good faith based solely on that person's understanding of materials published in the Federal Register. Both the Internal Revenue Service and the United States Customs Service have extensive private letter ruling programs designed to provide highly technical guidance to persons on tax and customs matters, respectively. A similar program administered by the Office of Foreign Assets Control (OFAC) provides guidance to persons and businesses concerning compliance with OFAC regulations implementing foreign sanctions programs with respect to hostile foreign governments. The Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS), which are the Federal agencies with primary supervisory authority over national banks and savings associations, provide advisory and interpretative letters to financial institutions regarding compliance with Federal laws and regulations designed to ensure the safety and soundness of insured depository institutions and to protect depositors. Publication of such documents in the Federal Register, which are issued by the thousands each year, would be extremely costly and could, in certain instances, result in the inappropriate public disclosure of confidential business or other information.

Many agencies utilize a variety of other means to disseminate guidance information to the public. For example, the Internal Revenue Service publishes revenue rulings and revenue procedures in the Internal Revenue Bulletin; the Bureau of the Public Debt issues interpretations under the Government Securities Act and the rules governing auctions of marketable Treasury securities that are available through various private publication services (e.g., CCH and BNA); the OCC and OTS provide extensive guidance on all aspects of Federal banking law to financial institutions through the Banking Circular and Thrift Bulletin, respectively, which are made available through regular mailings, private publication services, computer research services (e.g., LEXIS and Westlaw) and the Internet. Section 625 of the Tariff Act of 1930 (19 U.S.C. 1625), as amended in 1993 by the North American Free Trade Agreement Implementation Act, requires the Secretary of the Treasury to publish certain interpretative rulings in the Customs Bulletin and strongly encourages the use of the Customs Bulletin and the Customs electronic bulletin board as the principal means for Customs to communicate information to the trade community. Many agencies, particularly the Internal Revenue Service, also provide the public with detailed publications providing guidance on how to comply with statutes and regulations.

Each of these highly successful and beneficial programs would be rendered meaningless by the bill because they would be irrelevant to a determination of whether a person acted reasonably and in good faith. Indeed, it is likely that the bill would result in decreased public use of these programs because it removes any incentive for persons to look beyond what appears in the Federal Register in order to determine whether they are in compliance with a particular law or regulation.

This provision also is inconsistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which received broad bipartisan support and was signed into law by the President

on March 29, 1996. One of the stated purposes of SBREFA is to develop more accessible sources of information on regulatory and reporting requirements for small businesses. For example, SBREFA section 212(a) requires agencies to publish compliance guides with respect to rules that impose a significant economic impact on small businesses. Section 214 specifically contemplates that such guides would be distributed by Small Business Development Centers. SBREFA directs agencies to provide non-Federal Register guidance to small businesses on how to comply with the law and regulations; H.R. 3307 tells the small business community it can ignore those compliance guides and rely solely on what the agency published in the Federal Register.

We also note that SBREFA section 212(c) specifically provides that in a regulatory enforcement action "the content of the small entity compliance guide may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages." We fail to understand why it is appropriate to consider a small business compliance guide for purposes of determining the reasonableness of a fine or penalty, but not for determining whether the defendant acted reasonably and in good faith with respect to complying with the rule explained by the compliance guide.

If this bill is enacted, it will in all likelihood dramatically increase the number of regulations published in the Federal Register as well as the detail and complexity of those regulations. The number will increase as agencies publish the entire range of compliance materials not now published in the Federal Register. Instead of writing clear and concise regulations that allow for necessary flexibility, detail and complexity will increase as agencies attempt to list or enumerate each and every situation in which a rule would or would not apply. Such a result is clearly contrary to widely supported Administration efforts to streamline and simplify regulations. It also is inconsistent with SBREFA section 203(4), which declares that a purpose of the act is "to simplify the language of Federal regulations affecting small businesses."

The bill also provides that a court or agency can give deference to an agency interpretation of a rule only if that interpretation was published in the Federal Register or "otherwise available" to the defendant. This provision appears to be in conflict with the provision in the bill that prohibits an agency or court from considering an interpretation of a rule that was not published in the Federal Register when determining if a person reasonably believed that he or she was in compliance with a rule. We fail to understand why an agency interpretation that was "otherwise available" to a defendant cannot be considered when determining whether the defendant reasonably believed he or she was in compliance with a rule, but can be considered if it subsequently is determined that the defendant unreasonably believed he or she was in compliance.

The bill would have serious consequences for the entire spectrum of Treasury's law enforcement and regulatory programs, some of which are discussed below. With respect to the Internal Revenue Service (IRS), the system of penalties contained in the Internal Revenue Code (Code) has been carefully developed over the years to balance the interests of both the taxpayer and the government. It appears, however, that the bill would completely override the

penalty structure of the Code. For example, Code section 6662(d)(2)(B) provides for a reduction in the penalty for making a "substantial understatement" of tax only if (1) there is "substantial authority" for the taxpayer's position or (2) there is a reasonable basis for the taxpayer's position and the taxpayer adequately discloses the relevant facts on the tax return. Code sections 6651 and 6656 provide that a penalty is not applicable if the defendant's failure to comply "is due to reasonable cause and not due to willful neglect." These are objective standards that can be administered by examining the facts and circumstances of each case.

Under the bill, however, no penalty could be imposed if the taxpayer reasonably and in good faith determined that his or her position was correct. Since the likelihood of a penalty is significantly reduced by the bill's subjective standards, the bill will encourage taxpayers to take more aggressive positions when filing their tax returns. We believe that the bill will encourage taxpayers to "shop around" for tax advice until they find a practitioner who will provide the sought after opinion. Indeed, under the bill it appears that a taxpayer could "reasonably and good faith" rely on such an opinion, even if the practitioner's advice was unreasonable or not made in good faith. The potential revenue loss to the government could be substantial.

We are seriously concerned that the scope of the bill may extend beyond the imposition of traditional tax penalties to the actual enforcement of Federal taxes. Because the term "other penalty" could be construed to include a "taking" or "seizure" of property (see 5 U.S.C. 551(10)(D)), it is possible that the bill could apply to the levy or seizure of property pursuant to a tax lien for unpaid taxes. If so, the bill would permit a taxpayer to assert the "reasonable and good faith" defense for unpaid Federal taxes because the ultimate actions available to the government to obtain payment—levy and seizure of property for a tax sale—would be "penalties" subject to the defense. Thus, even if a taxpayer was wrong on the law, but reasonably thought otherwise, the Internal Revenue Service could be precluded from collecting the taxes lawfully due the government. Again, the potential revenue loss to the government could be substantial.

The bill would make it much more difficult for the OCC and OTS to successfully bring proceedings against officers and directors whose actions jeopardize the safety and soundness of our financial institutions. Ultimately, this could increase the liability of the Federal deposit insurance funds, with those costs being ultimately borne by the American taxpayer. We are seriously concerned that the bill's "reasonable and in good faith" standard could immunize officers and directors who clearly have violated safety and soundness requirements, as well as their fiduciary duties, by permitting them to claim ignorance of the law, or to interpret the law in a way that justifies their actions.

OFAC is charged with implementing Presidential determinations to impose economic, trade and other sanctions on hostile governments such as Iran, Iraq and Libya. Although OFAC publishes regulations in the Federal Register implementing its sanctions programs, administration of the sanctions programs relies heavily on individual OFAC licensing determinations and advisory opinions is-

sued in response to specific requests, which are not published or otherwise made available because they reflect confidential business information. The bill would allow a person to make an individual determination as to the meaning of an OFAC regulation without applying for a specific license or advisory interpretation, and then seek to avoid civil or criminal penalties by arguing that he or she reasonably and in good faith relied on the published regulations. Such a result would seriously undermine the ability of the United States to administer foreign sanctions programs. The Federal government must have greater certainty that it will be able to direct policy and control the conduct of U.S. persons in dealing with hostile nations.

Many of the same concerns would also apply to penalties for violations of the counter-money laundering provisions of the Bank Secrecy Act. This statute, administered by Treasury's Financial Crimes Enforcement Network (FinCEN), is a key component of Federal efforts to detect trafficking in illicit drugs and other organized crime.

In conclusion, we do not believe that the proposed legislation is necessary in order to protect law-abiding citizens from the arbitrary imposition of civil or criminal fines or other penalties. Indeed, the Administration's program providing for the waiver of fines and penalties intended to benefit those first-time violators who in good faith have attempted to comply with the law. The bill would, however, give criminal and civil defendants, rogue members of regulated industries and tax protestors who intentionally violate laws or regulations the ability to protect themselves from the imposition of fines and penalities on mere technicalities. The bill would make it easier for defense counsel to construct post hoc defenses based on spurious interpretations of agency regulations. The vagueness of the bill would invite frivolous challenges to agency interpretations of both its regulations and its implementing statutes.

The Office of Management and Budget has advised that there is no objection to the submission of this report.

Sincerely,

EDWARD S. KNIGHT, *General Counsel.*

U.S. DEPARTMENT OF LABOR,
SECRETARY OF LABOR,
Washington, DC, July 15, 1996.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: It is my understanding that H.R. 3307, the "Regulatory Fair Warning Act," is to be considered by your Committee in the near future. I am writing to express the Department of Labor's strong opposition to this legislation.

Section 2 of the bill provides that an agency may not impose a civil or criminal fine or other penalty against a person for violation of a rule, if, *inter alia,* the agency finds—(1) that the rule and other agency guidance and policies published in the Federal Register failed to give the person fair warning of the conduct prohibited or required; or (2) that prior to the violation, the person reasonably

and in good faith determined, based upon the rule and other agency guidance and policies, that it was in compliance with, exempt from, or otherwise not subject to the rule's requirements; or, (3) that the violation was committed in reasonable reliance upon a written statement by an appropriate Federal or State official (made after disclosure by the person of all material facts) that the person was in compliance with, exempt from, or otherwise not subject to the rule's requirements. (Section 3 of the bill imposes the same restrictions on courts.)

While we agree that certain aspects of the regulatory process could be improved and recognize and appreciate your efforts to improve protections for America's working men and women, we are also convinced that H.R. 3307 would not advance this goal. We are especially concerned that, if this legislation were enacted, it would have a drastic and detrimental effect on the Department's ability to protect the Nation's working men and women.

We believe H.R. 3307 could promote extensive and costly litigation concerning whether individuals "reasonably and in good faith" determined that they were in compliance with, or exempt from, a rule. Such litigation could force Federal agencies to move away from flexible performance-oriented rulemaking that allows for the exercise of judgment and common sense to overly-prescriptive specification rulemaking that requires agencies to define the application of every rule to every conceivable situation. Clearly, this result is unnecessary, unreasonable and would be extremely burdensome and costly to the Federal Government. It would also prove costly to business, which has strongly supported the use of performance-oriented standards. While the current legislative desire is to reduce the amount of litigation, this bill would actually increase the amount of litigation.

In this regard, we are extremely concerned about the bill's "fair warning" requirement. At the outset, we believe that the requirement is unreasonably vague, because the term "fair warning" is not defined, and that the requirement would encourage massive litigation by individuals seeking to obtain protection from civil and criminal fines or other penalties for violating agency rules. We also believe that the Federal Register publication requirement is not reasonable, since for many of our agencies, and for many members of the regulated community, publication in the Federal Register is not necessarily the exclusive means for providing actual notice and understanding to the regulated community.

Furthermore, we believe that this overly prescriptive requirement could seriously undermine our efforts to protect our Nation's workers. For example, in a Mine Safety and Health Administration (MSHA) enforcement case, 10 miners were killed in a methane gas explosion at an underground coal mine in Kentucky in 1989. The cause of the explosion was a buildup of methane gas while the mine operator was moving equipment. While an investigation of this accident later led to 14 guilty pleas or convictions of company officials, some of which involved substantial prison sentences for willful violations of basic safety laws, the result might have been an acquittal under H.R. 3307. The operator could have argued that "fair warning" was not provided by the agency's rule, because it did

not specifically state that the mine operator's activity, which clearly put miners in grave danger, constituted a violation.

We also have serious concerns with the provision of the bill which bars civil and criminal fines or other penalties against a person where *the person* "reasonably and in good faith" determined that it was in compliance with or exempt from the rule. By placing the emphasis on the subjective understanding of the person, the bill: (1) overturns a long-standing principle that ignorance of the law is no excuse, and (2) entices individuals to construct "good faith" compliance arguments to escape legal requirements that Congress has deemed necessary to protect the public. If a person can construct a "reasonable" argument that the conduct is not proscribed by rule, the person is immune from any fine or penalty for violation, regardless of how much harm to the public health or safety may result. The following example may serve to illustrate this point.

In an enforcement action under the Occupational Safety and Health Act, 29 U.S.C. 658 *et seq.*, an employer at a construction site used a crane to swing a 2,600 pound load over two employees working on an aircraft carrier deck. A rope in the load broke, causing the load to fall 40 feet onto the workers, killing one and injuring the other. At the hearing before the Occupational Safety and Health Review Commission ("Commission"), the Commission ruled that the employer violated a standard prohibiting the use of swinging loads by a crane over employees, and rejected the employer's argument that the term "swing" did not apply because the cited crane was carrying the load in only one direction. However, the defendant may have been acquitted under H.R. 3307, by arguing that, under his subjective understanding of the law, he reasonably and in good faith determined that the term "swing" applied only to a two-directional movement.

We also have strong objections to the provision allowing individuals to escape civil and criminal fines or other penalties through a reasonable reliance on a written statement by a Federal or State official "authorized to implement or ensure compliance with the rule." Among other things, this provision would encourage forum shopping by members of the regulated public who seek written statements that narrow the scope of a regulation's coverage to exclude particular activity. This will also have an inevitable chilling effect on agency officials trying to provide helpful, informal guidance to members of the public; they will fear that such advice could have negative enforcement consequences. In this regard, we note that the recently enacted "Small Business Regulatory Enforcement Fairness Act" encourages agency officials to provide compliance assistance information to members of the small business community, while H.R. 3307 would promote the opposite results.

The Department of Labor is committed to eliminating regulations that are outdated, unclear and ineffective, and to streamlining and simplifying regulations that need to be retained. While the President has made elimination of unreasonable and burdensome regulations a priority of this Administration, equally important is the ability of each agency to carry out its responsibilities to promote the common welfare of working men and women. We believe that this goal would be thwarted by the enactment of H.R. 3307, which

would impede our ability to carry out our mission in these times of declining resources.

The Office of Management and Budget has advised that there is no objection to the submission of this report to the Congress from the standpoint of the President's program.

Sincerely,

ROBERT B. REICH.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 3307 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

Section 1—Short title

Section 1 of the bill sets forth its short title as the "Regulatory Fair Warning Act."

Section 2—Affirmative defenses against imposition of fines or penalties by agencies

Section 2 of the bill amends title 5 of the United States Code by adding a new subsection (d) to section 558 of that title. This subsection establishes certain affirmative defenses against penalties in agency enforcement actions.

Subsection (d)(1)

New subsection 558(d)(1) creates two affirmative defenses against the imposition of a fine or other penalty by agencies for the violation of federal rules. This subsection is intended to provide guidance to an agency in determining whether or not it should impose penalties upon a person.[55]

Subsection (d)(1)(A)

Subsection (d)(1)(A) sets forth the first of two affirmative defenses provided for in the bill. It provides that no fine or penalty shall be imposed on a person by an agency for a violation of a rule if the agency finds that the rule, other general statements of policy, and related guidances, policies, and other public statements, published in the Federal Register by the agency, or where there was actual notice, failed to give such person "fair warning" of the conduct that the rule prohibits or requires. This provision, referred to as the "fair warning defense," provides a statutory basis from which a person may argue against the imposition of penalties by an agency in an enforcement action.

Subsection (d)(1)(B)

Subsection (d)(1)(B) sets forth the second of the two defenses provided for in the bill. It provides that no fine or penalty shall be im-

[55] The term "person" as used in the bill is intended as it is defined in section 551 of title 5 to include: an individual, partnership, corporation, association, or public or private organization other than an agency. 5 U.S.C. § 551 (1994).

posed on a person by an agency for the violation of a rule if the agency finds that a person committed the violation in reasonable reliance upon a written statement by a Federal or State official, with real or apparent authority to interpret such rule, after disclosure by the person of all the material facts. This provision, referred to as the "reasonable reliance defense," is intended to provide a statutory basis from which a person may argue against the imposition of penalties by an agency in an enforcement action.

Subsection (d)(3)

Subsection (d)(3) defines when a person shall be considered to have received fair warning. It provides that a person shall be considered to have received fair warning of the conduct that a rule prohibits or requires under two circumstances. The first circumstance, set forth in subsection (d)(3)(A), states that a person is considered to have received fair warning, if that person, acting reasonably and in good faith, would be able to identify with ascertainable certainty, the standards with which the agency expects the person's conduct to conform. The second circumstance under which a person shall be considered to have received fair warning is set forth in subsection (d)(3)(B). It provides that fair warning has been received when a person first received notice of the initiation of an agency enforcement proceeding against them for a violation of a rule.

Subsection (d)(4)

New subsection (d)(4) clarifies that no health or safety related rule issued on an emergency basis will be subject to the defenses provided in this legislation.

Section 3—Affirmative defenses against imposition of fines or other penalties by courts

Section 3 of the bill amends title 28 of the U.S. Code by adding at the end of chapter 111 a new section 1660. The new section 1660, in general, provides that no court shall impose a civil or criminal fine or penalty or approve a final penalty imposed by an agency under certain circumstances.

Subsection (a) of section 3

Subsection (a) of section 3 of the bill provides that chapter 111 of title 28 of the U.S. Code is amended by adding at the end a new section. The description of that new section, section 1660, is detailed below.

Subsection 1660(a)

The circumstances set forth in new subsection 1660(a) of title 28 under which penalties shall not be imposed by a court are identical to the circumstances provided in section 2 of this bill regarding restrictions on an agency's authority to impose penalties. As under section 2 of this bill regarding agencies, any decision by a court to impose penalties, or approve of an agency's imposition of penalties, shall be contingent upon the findings of the court regarding the defenses proffered. Subsection (a) of the new section 1660 to title 28

provides a statutory basis for two affirmative defenses against the imposition of penalties by courts.

Subsection 1660(a)(1)

New subsection 1660(a)(1) sets forth the circumstances upon which the "fair warning" affirmative defense may be based to preclude the imposition of penalties by a court. These circumstances and the policy arguments supporting this defense are identical to the circumstances and arguments supporting such defense when proffered to an agency to preclude penalties as provided in section 2 of the bill, establishing a new 5 U.S.C. 558(d)(1)(A).

Subsection 1660(a)(2)

New subsection 1660(a)(2) of title 28 sets forth the second of two affirmative defenses provided for in the bill against the imposition of penalties by courts. This subsection describes the basis for the "reasonable reliance" defense wherein a person demonstrates that they relied upon a written statement of an authorized official that their conduct would be in compliance with a rule. This subsection, which provides a defense against penalties imposed by a court, is identical to new subsection 5 U.S.C. 558(d)(1)(B) established under section 2 of this bill.

Subsection 1660(b)

New subsection 1660(b) of title 28 would preclude a court from granting deference to an agency's interpretation of a rule which is the subject of an enforcement proceeding when that interpretation was not available to the regulated public prior to the violation. This provision regarding a court's discretion is identical to new subsection (d)(2) of 5 U.S.C. 558, which would be created by section 2 of this bill.

Subsection 1660(c)

Subsection (c) of new section 1660 of title 28 defines when a person for purposes of section 3 of the bill will be considered to have received "fair warning." This provision is intended to guide a court in determining whether or not a fair warning defense has merit. This subsection is identical to subsection 558(d)(3) of title 5 which would be created by section 2 of this bill.

Subsection 1660(d)

Subsection (d) of new subsection 1660 of title 28 provides that the defenses authorized by section 3 of this bill regarding a court's authority to impose penalties shall not apply to a violation of a health or safety related rule issued on an emergency basis. This provision is identical to subsection 558(d)(4) of title 5 which would be established by section 2 of this bill.

Subsection (b)

Subsection (b) of section 3 of the bill provides a clerical amendment to chapter 111 of title 28 of the U.S. Code to provide a new section and title. The section and title are as follows: "1660. Affirmative defense against fines or other penalties for violations of agency rules."

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SECTION 558 OF TITLE 5, UNITED STATES CODE

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) * * *

* * * * * * *

(d)(1) No fine or other penalty shall be imposed on a person by an agency for a violation of a rule if the agency finds that—

(A) the rule, other general statements of policy, and related guidances, policies, and other public statements—

(i) published in the Federal Register by the agency, or

(ii) as to which such person had actual notice,

failed to give such person fair warning of the conduct that the rule prohibits or requires; or

(B) such person committed the violation in reasonable reliance upon a written statement by a Federal or State official, with real or apparent authority to interpret such rule, made after disclosure by such person of all material facts that such person was in compliance with, exempt from, or otherwise not subject to, the requirements of the rule.

(2) In an action brought to impose a fine or other penalty on a person for an alleged violation of a rule, an agency shall not give deference to any interpretation of such rule relied on by the agency that was not published in the Federal Register or was not otherwise available to such person prior to the alleged violation.

(3) For purposes of this subsection, a person shall be considered to have received fair warning of the conduct that a rule of an agency prohibits or requires—

(A) if a person, acting reasonably and in good faith, would be able to identify, with ascertainable certainty, the standards with which such agency expects such person's conduct to conform, or

(B) when a person first received notice of the initiation of a proceeding against such person for violation of such rule by the agency which issued such rule.

(4) The defenses authorized by this subsection shall not apply with respect to a violation of a rule which is a health or safety related rule which has been issued on an emergency basis.

CHAPTER 111 OF TITLE 28, UNITED STATES CODE

CHAPTER 111—GENERAL PROVISIONS

Sec.
1651. Writs.

* * * * * * *

1660. Affirmative defense against fines or other penalties for violations of agency rules.

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§ 1660. Affirmative defense against fines or other penalties for violations of agency rules

(a) No civil or criminal fine or other penalty shall be imposed on a person by a court for a violation of a rule and no fine or other penalty imposed by an agency for a violation of a rule shall be approved by a court if the court finds that—

(1) the rule, other general statements of policy, and related guidances, policies, and other public statements—

(A) published in the Federal Register by the agency which promulgated such rule, or

(B) as to which such person had actual notice,

failed to give such person fair warning of the conduct that the rule prohibits or requires; or

(2) such person committed the violation in reasonable reliance upon a written statement by a Federal or State official, with real or apparent authority to interpret such rule, made after disclosure by such person of all material facts, that such person was in compliance with, exempt from, or otherwise not subject to, the requirements of the rule.

(b) In an action brought to impose a civil or criminal fine or other penalty on a person for an alleged violation of a rule, the court shall not give deference to any interpretation of such rule relied on by the agency that promulgated the rule that was not published in the Federal Register or was not otherwise available to such person prior to the alleged violation.

(c) For purposes of this section, a person shall be considered to have received fair warning of the conduct that a rule of an agency prohibits or requires—

(1) if a person, acting reasonably and in good faith, would be able to identify, with ascertainable certainty, the standards with which such agency expects such person's conduct to conform, or

(2) when a person first received notice of the initiation of a proceeding against such person for violation of such rule by the agency which issued such rule.

(d) The defenses authorized by this section shall not apply with respect to a violation of a rule which is a health or safety related rule which has been issued on an emergency basis.

DISSENTING VIEWS

We fully support the concept of regulatory fair warning—the government should provide its citizens with fair warning of what its laws and regulations require and citizens should be able to rely on information received from their government. Indeed, that principle is embodied in the Due Process Clause of the United States Constitution. However, the Republican "Regulatory Fair Warning Act" is anything but fair and goes well beyond these bedrock principles. The bill would create unprecedented and unjustified new legal defenses to both civil and criminal enforcement of any federal regulation that will undermine public health, safety, environmental protection and effective law enforcement. That is why environmental groups, consumer groups and prosecutors join us in opposition to this legislation.

1. FAIR WARNING IS ALREADY REQUIRED UNDER LAW

Due process and general principles of administrative law require that a person must have fair notice before penalties can be assessed.[1] In criminal cases, the rule of lenity already requires that ambiguity in a statute be resolved in the defendant's favor.[2] The law also provides an estoppel defense if an individual relies on statements made by the government.[3] If this legislation were designed to codify and clarify these principles, we would support it. But that is not what H.R. 3307 does.

At the Subcommittee hearing on the issue of fair warning, we heard very compelling testimony from a retired couple, the McMackins, who became entangled in a wetlands dispute with the Army Corps of Engineers. Many of us have tried to aid constituents in similar predicaments. But H.R. 3307 does not provide any assistance to the McMackins. Neither of the defenses provided by the bill apply to the facts of their case. Fortunately, President Clinton has already solved the problem of homeowners like Mr. McMackin: in July, 1995, the President issued a nationwide Clean Water Act exemption that allows small landowners in non-tidal areas to build a single family home without applying for a permit.[4]

Although the McMackins would not benefit from H.R. 3307, the California District Attorneys Association, an organization composed of the elected attorneys of California's 58 counties and 3,000 deputy district attorneys and city prosecutors had this to say about those who would benefit:

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[1] *See General Electric Co.* v. *EPA,* 53 F.3d 1324 (D.C.Cir. 1995) (Government cannot obtain a penalty for the violation of a new regulatory interpretation about which the company did not have fair notice. Where different divisions of the agency disagree on the rule's interpretation there is no fair notice.)

[2] *Crandon* v. *United States,* 494 U.S. 152, 168 (1990).

[3] *United States* v. *Brebner,* 951 F.2d 1017 (9th Cir. 1991).

[4] Home-Related Construction in Wetlands Approved by New Nationwide Permit No. 29—Issued 7/19/95.

> This affirmative defense would be prone to misuse by dishonest defendants * * * could have the unintended consequence of allowing unscrupulous defendants to claim ignorance, even if they are aware of existing regulations, especially where there is no penalty for improperly raising the affirmative defense. The difficulty in proving actual knowledge of a rule would make application of sanctions against violators virtually impossible * * *[5]

2. THE LEGISLATION WAS INITIALLY WRITTEN BY CORPORATE LOBBYISTS

According to reports in the New York Times and the Atlanta Journal and Constitution, the Senate amendment that H.R. 3307 is based on was actually written by lobbyists from Georgia-Pacific, an international wood products company being investigated by the EPA for Clean Air Act violations.[6] The New York Times outlined the different approaches adopted by three different wood products companies in response to an EPA investigation of industry practices. Weyerhaeuser began to comply with the laws and installed millions of dollars worth of pollution control equipment. It received no fine from the EPA. Louisiana-Pacific was fined $11 million by the EPA and agreed to install $70 million worth of pollution control equipment. Georgia Pacific decided to send in lobbyists to draft and help pass legislation.[7]

Edward Dowd, the United States Attorney from the Eastern District of Missouri testified against H.R. 3307 on behalf of the Justice Department. He noted that "when we took a close look at the bill's language, compared it with current law, and talked to other prosecutors and civil attorneys, we came to realize that H.R. 3307 would have many harmful and dangerous consequences that you would not intend."[8] In a letter, the Justice Department wrote, "we strongly object to * * * broad and absolute statutory defenses. Among other things the codification of such defenses creates enormous opportunities for abuse, and could immunize egregious violations that cost taxpayers millions of dollars and result in serious harm to the public."[9]

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[5] Letter from Lawrence G. Brown, Executive Director, and Edwin F. Lowry, Director, Environmental Project, California District Attorneys Association, to the Rep. George Gekas (July 19, 1996).

[6] Stephen Engelberg, "Wood Products Company Helps Write a Law to Derail an E.P.A. Inquiry," *New York Times,* April 25, 1995; Stephen Engelberg, "Tall Timber and the EPA," *New York Times,* May 21, 1995; Don Melvin, "Georgia-Pacific Helps Draft a Bill to Rein in EPA," *Atlanta Journal and Constitution,* April 26, 1995; Rob Tucker, "Weyerhaeuser Actions Avert Air Pollution Prosecution," *News Tribune,* July 11, 1995.

[7] During consideration of H.R. 3307, the Subcommittee on Commercial and Administrative Law adopted—on a party line vote—an amendment offered by Rep. Barr to make the bill's provisions retroactive, and which could have benefitted Georgia Pacific. Since that time, Georgia Pacific has settled its lawsuit with the EPA, agreeing to pay a fine, install pollution control equipment at 11 plants in eight southeastern states, and to obtain permits and conduct audits and 26 facilities.

[8] Regulatory Fair Warning Act, Hearing before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 16 (1996) (statement of Edward Dowd, U.S. Attorney, Eastern District of Missouri).

[9] Letter from Kent Marcus, Acting Assistant Attorney General, to Senator Orrin Hatch 4 (April 5, 1995). The concepts underlying the legislation "are already in effect... under many statutes and the Principles of Federal Prosecution, a defendant's good faith efforts at compliance are an important factor that is considered when the government decides whether to bring a civil or criminal enforcement action and the amount of penalties to seek, if any. Similarly, a defendant's reasonable, good faith reliance on statements by responsible federal or state officials may also be considered. Courts and juries also weigh these factors in appropriate cases. Nevertheless,

3. THE FACT THAT AN INTERPRETATION HAS NOT BEEN PUBLISHED IN THE FEDERAL REGISTER DOES NOT MEAN THAT THE REGULATED ENTITIES DO NOT HAVE NOTICE

In the original bill, even actual notice would not have qualified as fair notice. For example, an agency may respond to inquiries with a letter setting forth its interpretation, such as IRS and U.S. Customs Service private letter rulings,[10] or issue "Airworthiness Directives" directly to affected airlines after a problem is discovered.[11] These types of actual notice would not have been sufficient notice under the bill as introduced and as approved by the Subcommittee. Although this provision has been rewritten, problems still remain with this section of the bill.

For example, under the Americans with Disabilities Act, the Justice Department is required to provide Technical Assistance Manuals to facilitate compliance.[12] These manuals are not published in the Federal Register, and under the bill would not serve as fair notice although they are widely disseminated and courts have held that the interpretations of the ADA found in the Manuals are entitled to deference.[13]

Court rulings are also excluded from the definition of fair notice under the Committee approved bill, so even a Supreme Court ruling interpreting the regulation at issue could be ignored by defendants.

Tax evaders have attempted to argue that they did not act willfully because the IRS had not published anything specifically saying that a particular tax evasion scheme was illegal. Under H.R. 3307, according to the Department of Justice, the tax evader would be able to claim they did not have fair notice.[14] Arthur Levitt, Chairman of the Securities Exchange Commission, raised similar concerns:

> The statute narrowly defines notice to be agency rules and interpretations published in the Federal Register. Unfortunately such a defense can appear in some cases to be reasonable, but in reality can result in disastrous consequences. * * * For example, because insider trading is not specifically described in Rule 10b–5, Ivan Boesky (and a host of equally prominent securities law violators) could have escaped liability under this bill for one of the biggest securities frauds of the 1980s. The bill might have precluded the Commission's emergency action in *Foundation for New Era Philanthropy,* because SEC rules do not specifically address inducing churches and universities to in-

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we strongly object to any effort to transform these considerations into broad and absolute statutory defenses. Among other things, the codification of such defenses creates enormous opportunities for abuse, and could immunize egregious violations that cost taxpayers millions of dollars and result in serious harm to the public."

[10] Letter from Edward S. Knight, General Counsel, U.S. Dept. of the Treasury, to Rep. Henry J. Hyde (July 15, 1996).

[11] Letter from Nancy E. McFadden, General Counsel, U.S. Department of Transportation, to Rep. George W. Gekas (June 19, 1996).

[12] *See* 42 U.S.C. 12206(c)(3).

[13] Letter from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, U.S. Dept. of Justice, to Rep. Henry Hyde 2 (July 12, 1995).

[14] *Id.* at 3.

vest over $100 million in a phony charitable foundation. * * * [15]

4. THE BILL WOULD ALLOW DEFENDANTS TO SEARCH OUT A WRITTEN STATEMENT FROM A WIDE RANGE OF EMPLOYEES IN A RELEVANT FEDERAL OR STATE AGENCY TO APPROVE CONDUCT THAT WOULD OTHERWISE VIOLATE FEDERAL REGULATIONS, EVEN WHERE THERE IS FAIR NOTICE

This provision could undermine national uniform standards, particularly environmental standards. The statement does not have to be made public or even shared with the appropriate federal agency. In the worst case, in-state businesses, or businesses that threaten to relocate, could be exempted from certain federal laws. The EPA recently settled a case where a company located in a carbon monoxide non-attainment area was able to obtain a sham permit from the local air pollution control district to allow it to evade the Clean Air Act.[16] The company, California Almond Growers Exchange, agreed to lower its emissions by 96% and pay a fine. Under H.R. 3307, this company would have been effectively immunized.

According to the Environmental Defense Fund, "H.R. 3307 would punch two large and uncontrolled loopholes in environmental protection laws (among others) * * * authorize any one of hundreds or thousands of bureaucrats to write out special exemptions, even if contradictory to the law. * * *" [17] As was pointed out at the hearing on the bill, "America's environmental quality is among the best in the world * * * due in very large part to landmark environmental laws passed by Congress since 1970. But the laws themselves are only pieces of paper, it is respect for the rule of law and effective compliance with these laws that is needed to protect public health and environmental quality. * * * Many federal health, safety, and environmental provisions were enacted in the first instance to establish a solid foundation of minimal protections that would be in place in each State. * * *" [18]

5. BY CREATING A "MISTAKE OF LAW" DEFENSE, THE BILL AS ORIGINALLY INTRODUCED REWROTE EVERY STRICT LIABILITY STATUTE

In criminal law, the general rule is that mistake of law is no excuse. As the Justice Department noted in its letter, the bill would "turn on its head the legal principle that those who engage in dangerous or highly regulated activities are responsible for knowing the rules that govern their behavior." [19] The Department of Agriculture noted in its letter of opposition to the bill that:

> The bill has the effect of inappropriately adding a state of mind defense to the application of all Federal regula-

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[15] Letter from Arthur Levitt, Chairman, U.S. Securities and Exchange Commission, to Rep. Thomas J. Bliley, Jr., and Rep. John D. Dingell (July 25, 1996).

[16] Regulatory Fair Warning Act, Hearing before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 9 (1996) (Statement of the Environmental Protection Agency).

[17] Letter from David Roe, Senior Attorney, Environmental Defense Fund, to Rep. Henry J. Hyde (July 15, 1996).

[18] Regulatory Fair Warning Act, Hearing before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 16 (1996) (statement of David Hawkins, Senior Attorney, Natural Resources Defense Council).

[19] Letter from Kent Marcus, *supra* note 9, at 6.

> tions. In many of the statutes implemented and enforced by USDA agencies, Congress has directed that penalties should be imposed regardless of a party's intent. For example, Congress has made the distribution of adulterated meat food products or the movement of prohibited animal or plant products strict liability offenses.[20]

The Department of Commerce noted in its letter of opposition to the bill:

> Many of the violations established in the Export Administration Regulations are "strict liability" violations. In other words, if a person exports without a required license, that person has committed a violation, whether or not he knew that a license was required. Strict liability violations were included in the EAR to ensure that a party could not ship items, such as weapons technology, to a "rogue" country and avoid liability by remaining ignorant of the regulatory prohibition. H.R. 3307 would effectively eviscerate all such strict liability violations.[21]

The Commerce Department also noted, "simply put it is difficult to imagine that someone who fails to comply with the Fastener Quality Act and who, therefore, bears much of the responsibility for having a plane fall from the sky or a bridge collapse should be able to escape civil and criminal liability because he in 'good faith' thought he was in compliance with the requirements." [22]

6. AMENDMENTS APPROVED BY THE COMMITTEE FAIL TO REMEDY THE LEGISLATION'S INFIRMITIES

The Majority recognized the problems inherent in the legislation approved by the Subcommittee and the bill was substantially rewritten the day before the full committee markup. For example, the retroactivity provision was dropped and other productive changes made. However, serious problems remain, and are illustrated by the amendments that were offered, but rejected at the markup, all on party line votes.

For example, the bill as reported, still allows a state official to nullify the federal government's interpretation of a federal law, even where the United States government provided actual notice, as well as notice in the Federal Register. Congressman Scott offered an amendment to eliminate this possibility, but it was rejected. Congressman Scott also offered an anti-forum shopping amendment that would have prevented defendants from collecting multiple opinions from state and federal officials until they found one that they liked. This amendment, too, was rejected.

Congressman Reed offered an amendment to limit the bill's provisions to fair warning, codify *General Electric Co.* v. *EPA,* 53 F.3d 1324 (D.C. Cir. 1995), and avoid the other problems raised by the bill. Congresswoman Jackson-Lee offered an amendment to exempt regulations protecting human health and the environment to aug-

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[20] Letter from Bonnie Luken, Acting General Counsel, U.S. Dept. of Agriculture, to Rep. Jack Reed 2 (June 21, 1996).

[21] Letter from Susan G. Esserman, Acting General Counsel, U.S. Department of Commerce, to Rep. Jack Reed 1 (June 19, 1996).

[22] *Id.* at 2.

ment a provision already in the committee substitute that creates a largely illusory exemption for emergency rules. Both amendments were rejected by the Republicans.

Amendments were also offered related to worker safety protections, SEC enforcement, Consumer Products Safety Commission regulations that protect children from harmful products, and EEOC enforcement of sexual harassment and discrimination statutes. All were rejected along party line votes.

Even more disturbingly, the Majority refused to even consider a number of proposed amendments which would have protected American consumers and workers, by exempting enforcement of, among other things, airplane safety and security, export controls, telemarketing fraud, health laws, antitrust laws, Small Business Administration oversight of lenders, Department of Justice regulations dealing with sexually explicit conduct, and trade sanctions. Despite the fact that these amendments were pending, Republicans took the almost unprecedented step of closing consideration on H.R. 3307 after a mere six hours of debate and amendment.[23]

CONCLUSION

H.R. 3307 applies to all regulatory enforcement from antitrust and airline safety to safe drinking water and clean air. Particular care should be taken in drafting this type of legislation. No one would disagree with the basic concepts at the root of this legislation, fair warning and reliance on government statements. However, we believe more work needs to be done on this legislation before it can fairly be said to meet these goals. It is not worth placing the American public at risk with hastily crafted legislation that has such broad and dangerous impact.

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MAXINE WATERS.
ZOE LOFGREN.
CHARLES E. SCHUMER.
JERROLD NADLER.

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[23] Transcript of Judiciary Committee Markup of H.R. 3307 at 44, 45 (Aug. 1, 1996).